

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Verizon Telephone Companies)	WC Docket No. 08-49
For Forbearance Pursuant to 47 U.S.C. §)	
160(c) In Cox's Service Territory in the)	
Virginia Beach Metropolitan Statistical Area)	

**REPLY TO VERIZON'S OPPOSITION TO MOTION TO DISMISS OR, IN THE
ALTERNATIVE, DENY PETITION FOR FORBEARANCE**

The undersigned signatories (hereinafter referred to jointly as "Movants"), through counsel, file this Reply in response to the Verizon Telephone Companies' ("Verizon") Opposition to Motion to Dismiss or, in the Alternative, Deny Petition for Forbearance ("Verizon Opposition").¹ The Verizon Opposition entirely fails to establish any material difference between the instant Petition² and Verizon's previously-denied Virginia Beach forbearance petition³ that would justify reversing the result reached by the *6-MSA Order* and granting the requested relief.⁴ The Second Virginia Beach Petition therefore should be summarily dismissed or denied.

¹ Verizon's Opposition to Motion to Dismiss or, in the Alternative, Deny Petition for Forbearance at (filed May 19, 2008). *See also*, Motion to Dismiss or, in the Alternative, Deny Petition for Forbearance, WC Docket No. 08-49 (filed May 19, 2008) ("Motion").

² *Petition of the Verizon Telephone Companies For Forbearance Pursuant to 47 U.S.C. § 160(c) In Cox's Service Territory in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 08-49 (filed March 31, 2008) ("*Second Virginia Beach Petition*").

³ *Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical Area*, WC Docket No. 06-172 (filed Sept. 6, 2006) ("*First Virginia Beach Petition*").

⁴ *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd 21293 (2007) ("*6-MSA Order*").

Verizon makes three basic claims that purport to distinguish its Second Virginia Beach Petition from the First Virginia Beach Petition, which was denied by the Commission in its entirety a mere five months ago: (i) the Second Virginia Beach Petition responds to a new market share test that was established in the *6-MSA Order*; (ii) the Second Virginia Beach Petition includes new data regarding competition in the MSA; and (iii) the Second Virginia Beach Petition requests more narrow geographic relief. Verizon also includes a cursory assertion that its Second Virginia Beach Petition is not subject to issue preclusion and that it does not constitute a request for reconsideration of the *6-MSA Order*. Despite these claims, Movants have shown – and other commenters agree – that the immaterial differences between the First and Second Virginia Beach Petitions do not even justify conducting a full proceeding in response to the instant Petition.⁵ Instead, the Second Virginia Beach Petition should be dismissed or summarily denied.

I. THE COMMISSION DID NOT ESTABLISH A NEW “BRIGHT-LINE” FORBEARANCE TEST IN THE *6-MSA ORDER*

Verizon makes the erroneous allegation that the Commission established a “new bright-line” test in the *6-MSA Order* and that the mere existence of this alleged new test is a sufficient basis to warrant consideration of the Second Virginia Beach Petition a scant five months after the Commission’s denial of the First Virginia Beach Petition.⁶ The fact is, as Movants explained in nearly identical circumstances involving Verizon’s Rhode Island Petition,⁷

⁵ See, e.g., Comments of Cox Communications, Inc. at 2-3 (filed May 14, 2008) (“Cox Comments”); Cavalier Telephone, LLC’s Opposition to Verizon’s Petition for Forbearance at 1-2 (filed May 13, 2008) (“Cavalier Opposition”); Sprint Nextel Corporation’s Opposition to the Verizon Telephone companies Petition for Forbearance at 1-2 (filed May 13, 2008) (“Sprint Opposition”).

⁶ Verizon Opposition at 1, 6..

⁷ Petition of Verizon New England for Forbearance Pursuant to 47 U.S.C. §160 in Rhode Island, WC Docket No. 08-24 (filed Feb. 14, 2008) (“Rhode Island Petition”).

the Commission did not establish any new test in the *6-MSA Order*. Verizon's asserted "new test" therefore provides no basis for the Commission to review Verizon's Second Virginia Beach Petition.

Verizon claims the Commission established in its *6-MSA Order* a new test finding that "whether competitors have achieved a certain share of residential lines is the dispositive factor in determining whether forbearance is warranted."⁸ According to Verizon, the Commission's use of this test warrants Verizon's filing of the instant Petition. In fact, the Commission has, on numerous occasions, included a competitor's market share as a key component of the Commission's forbearance analysis and such market share has been considered in every forbearance analysis since the *Omaha Forbearance Order*.⁹ The history of this essential component of the forbearance analysis was discussed in the *6-MSA Order* – the very order in which the Commission denied Verizon's First Virginia Beach Petition - and thus should have come as no surprise to Verizon. Specifically, the Commission stated in the *6-MSA Order*:

In particular, Verizon's market shares in the MSAs at issue, measured consistent with our approach in the Qwest Omaha Forbearance Order and ACS Dominance Forbearance Order, are sufficiently high to suggest that competition in these MSAs is not adequate to ensure that the "charges, practices, classifications, or regulations . . . for [] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory" absent the regulations at issue.¹⁰

Consequently, Verizon's claims that the Commission's consideration of market share when evaluating forbearance proceedings is a "new bright line" test are without merit.

⁸ Verizon Opposition at 6.

⁹ See, e.g., *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Omaha Metropolitan Statistical Area*, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*").

¹⁰ *6-MSA Order*, at ¶ 27.

Moreover, even if the Commission had adopted a new test, Verizon would not be entitled to relief unless it could show that the facts have changed since the Commission used the “new” test to reject Verizon’s earlier request. As shown below and throughout the comments in this proceeding, the facts remain the same, so there is not basis for granting the new petition.

II. THE DATA IN VERIZON’S SECOND VIRGINIA BEACH PETITION IS NOT MATERIALLY DIFFERENT FROM DATA PRESENTED IN THE FIRST VIRGINIA BEACH PETITION

Verizon asserts that its Second Virginia Beach Petition contains updated data which justifies the Commission’s review of the petition.¹¹ However, the data Verizon cites is not materially different from data considered and rejected in the proceeding addressing the First Virginia Beach Petition. Even if the Commission were to review Verizon’s repackaged Petition – and it should not – a cursory review of the new cable competition data Verizon cites as evidence justifying grant of its petition reveals that forbearance still is not warranted.

In particular, the Verizon Opposition cites to recent press releases of several cable companies as evidence that there are changes in the level of competition which justify review – and presumably grant – of the current Petition. Verizon notes that Cox’s national business unit “grew by 30 percent in the past year” and that Cox reported “15.9 percent year-over-year increase in telephone subscribers.”¹² Similarly, Verizon stated that “in the first quarter of 2008 alone, four of the five major cable companies . . . added over 1 million telephony subscribers – an increase of 10 percent.”¹³ These statements, however, have no relation to the Virginia Beach market. Verizon highlights these national figures, but a key factor to Verizon’s argument and conspicuously lacking from its discussion is any connection between these figures and the state

¹¹ Verizon Opposition at 1-4.

¹² Verizon Opposition at 6-7.

¹³ *Id.* at 6.

of competition in the Virginia Beach MSA. None of the press releases that Verizon cites provides figures regarding the number of subscribers any cable operator attained in a specific geographic market, so Verizon is not presenting any evidence that there has been any increase in competition in the Virginia Beach MSA.

In contrast, Cox, which is Verizon's main competitor and the competitor upon which Verizon relies for evidence of competition in the Virginia Beach MSA, has explicitly stated that its facilities deployment and market share levels in the Virginia Beach MSA have not changed appreciably since Verizon's prior petition was justifiably denied.¹⁴ Specifically, Cox noted in its comments that it "has not, however, engaged in any large-scale facilities build-out since the Commission considered the 2007 Petition, so Verizon is just resubmitting the evidence that led the Commission to deny forbearance just a few months ago."¹⁵ Cox also explained that its previously-submitted facilities deployment and line count information that was considered by the Commission when it rejected the First Virginia Beach Petition has not changed and thus review of the Second Virginia Beach Petition is unwarranted. Specifically, Cox stated:

Cox submitted detailed facilities deployment and access line count information in late November 2007 for all of Cox's service areas covered by the 2008 Petition. This information was used by the Commission to deny the 2007 Petition in the Six MSA Order. Verizon alleges no significant change in the market since the Commission issued that Six MSA Order that would warrant a re-examination of the competitiveness of any part of the Virginia Beach MSA.¹⁶

The Office of the Attorney General of Virginia also questions the data presented in Verizon's Second Virginia Beach Petition. The Attorney General noted in its comments that:

¹⁴ Cox Comments at 4-5.

¹⁵ *Id.*

¹⁶ *See id.* at 2.

Until Verizon can show a material change in circumstances since December 2007, the Commission should be hesitant to modify its *Six MSA Order*, which was reached after extensive investigation and input from numerous stakeholders. Additionally, the Commission should be wary of any “new” information which could have, and should have, been considered in conjunction with the earlier petition. This is not to say that Verizon will not meet the standards for forbearance at some point in the future; but it has simply not been long enough for a material change in the state of the competitive market, and particularly facilities-based competition, since the December 2007 decision.¹⁷

Verizon essentially is asking the Commission to review its repackaged Petition based upon questionable “evidence” of increased competition and despite statements from Cox, its main competitor, that there have been no changes in Cox’s facilities coverage or market share.

III. VERIZON’S FOCUS ON A SMALLER GEOGRAPHIC MARKET IS NOT A MATERIAL CHANGE FROM THE FIRST VIRGINIA BEACH PETITION

Verizon’s attempts to differentiate the First and Second Virginia Beach Petitions on the grounds that they encompass different geographic areas and that this somehow justifies the Commission’s review of the Second Virginia Beach Petition also must fail.¹⁸ While the Second Virginia Beach Petition covers only areas where Cox is the incumbent local cable operator rather than the entire Virginia Beach MSA, this is a distinction without a difference. As demonstrated by the Motion, the geographic area that is the subject of the Second Virginia Beach Petition contains over “90 percent of the population within the Virginia Beach MSA” and is a subset of the geographic area addressed in the First Virginia Beach Petition. Accordingly, the data Verizon presented in its failed First Virginia Beach Petition included information pertaining to the entire geographic area in the Second Virginia Beach Petition. As discussed in Section II, Cox already has stated that there has been no change in its levels of facilities deployment and

¹⁷ Comments of the Office of the Attorney General of Virginia, Division of Consumer Counsel at 2 (filed May 12, 2008).

¹⁸ Verizon Opposition at 4-5.

line count information since the Commission rightfully denied Verizon's First Virginia Beach Petition. The Office of the Attorney General of Virginia also dismisses this supposed distinction:

The geographic area being analyzed for purposes of forbearance is not new. While Verizon no longer requests forbearance throughout the Virginia Beach MSA, Cox's territory includes 91% of the population of the MSA, making the geographic distinction nearly meaningless. Any suggestion that the narrowed geographic relief alone should warrant a different result is unpersuasive for that reason.¹⁹

Accordingly, there is no new data that Verizon can present to justify grant of the Second Virginia Beach Petition that wasn't already presented in the First Virginia Beach Petition and rejected in the *6-MSA Order*.

IV. THE SECOND VIRGINIA BEACH PETITION IS SUBJECT TO ISSUE AND CLAIM PRECLUSION AND CONSTITUTES AN UNTIMELY REQUEST FOR RECONSIDERATION OF THE *6-MSA ORDER*

Verizon offers barely a paragraph in response to the argument that review of the Second Virginia Beach Petition is barred by issue and claim preclusion and that the Second Virginia Beach Petition constitutes merely an untimely request for reconsideration of the *6-MSA Order*. Verizon states that issue preclusion does not apply because the Second Virginia Beach Petition provides new data to support the Petition. However, as discussed in Section II, *supra*, Verizon's asserted "updated" data is neither new nor relevant to the Virginia Beach MSA. Commenters such as Cavalier have shown that "[t]he new petition manipulates the same data, massages the same evidence the Commission found inadequate and chooses not to 'count' certain discrete pockets of customers within the MSA in an attempt to mask the shortcomings of Verizon's previous effort."²⁰ Similarly, Sprint Nextel demonstrates that "Verizon appears intent

¹⁹ Comments of Virginia Attorney General at 4.

²⁰ Cavalier Opposition at 2.

on filing and refilling a continuing stream of forbearance petitions . . . [i]n this instance, Verizon has failed to present any new material evidence that should cause the Commission to depart from its prior precedent and reach a different conclusion in this matter.”²¹ Accordingly, Verizon has not shown that the Second Virginia Beach Petition materially differs from the First Virginia Beach Petition. Therefore, the Second Virginia Beach Petition satisfies the four prongs of issue and claim preclusion addressed in Movants’ Motion.

Further, by continuing to argue that the Commission should consider other categories of evidence and analyze its forbearance request on a rate center, instead of wire center,²² basis Verizon’s Second Virginia Beach Petition constitutes an untimely request for reconsideration and should be rejected. Commenters such as the Telecom Investors agree that the Second Virginia Beach Petition is accurately described as a request for reconsideration. The Telecom Investors stated in their comments that “[w]hile Verizon labels its latest attempt to obtain premature deregulation of local telephone markets it still controls as a new forbearance petition, this label masks Verizon’s intent to belatedly petition the Commission for reconsideration of its already rejected forbearance petition for the Virginia Beach MSA.”²³

Finally, Verizon’s claim that the First and Second Virginia Beach Petitions are different because Verizon now provides data on a rate-center basis instead of a wire-center basis²⁴ also is unpersuasive and merely a poorly-disguised request for reconsideration of the *6-MSA Order*. Verizon is well aware that the Commission has consistently evaluated Section

²¹ Sprint Opposition at 4.

²² Verizon Opposition at 5.

²³ Telecom Investors’ Opposition to Verizon’s Petition at ii (filed May 13, 2008).

²⁴ Verizon Opposition, at 5.

251(c)(3) forbearance requests on a wire center basis.²⁵ Verizon is now seeking application of a different standard. As Cavalier noted, “[t]he Commission has made clear that in conducting its forbearance analysis with respect to unbundling loops and transport, it provides relief only in individual wire centers that are demonstrably competitive” and that “Verizon offers no response whatsoever to this precedent, and its attempt to analyze unbundling on a rate center basis should be denied.”²⁶ Similarly, Cbeyond and others also urged rejection of Verizon’s attempts to have the Commission change its forbearance analysis process by evaluating the Second Virginia Beach Petition on a rate center basis. Cbeyond and others noted in their comments that “the FCC has consistently considered competitors’ market share on an MSA basis and competitors’ facilities coverage on a wire-center basis. Verizon has provided no basis for departing from this practice in the instant proceeding.”²⁷ Movants assert that Verizon has not shown any material differences between the First and Second Virginia Beach Petitions that would defeat issue and claim preclusion nor has it refuted Movants’ and other commenters’ assertions that the Second Virginia Beach Petition constitutes an untimely request for reconsideration.

²⁵ See, e.g., *Virginia Beach Petition*, at 4, n.7 (“With respect to unbundling regulation, the Commission has granted forbearance on a wire-center basis. In Anchorage, the Commission considered the wire centers within the Anchorage study area, while in Omaha the Commission considered the wire centers within the Omaha MSA. . . . As discussed below, the Commission should analyze rate centers in place of wire centers here.”) (internal citations omitted).

²⁶ Cavalier Opposition at 12-13.

²⁷ Opposition of Cbeyond Inc., Integra Telecom, Inc., One Communications Corp., and Time Warner Telecom at 9 (filed May 13, 2008).

V. CONCLUSION

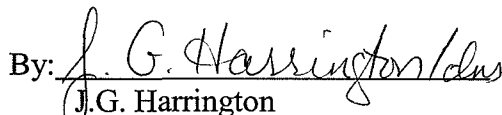
As discussed above, Verizon has not provided any reasonable justification for Commission review of its Second Virginia Beach Petition. The Second Virginia Beach Petition is not materially different from the First Virginia Beach Petition which was denied in its entirety by the Commission just a few months ago. For the foregoing reasons, the Commission should grant the Movants' Motion to Dismiss or, in the Alternative, Deny Petition for Forbearance.

Respectfully Submitted,

By: 

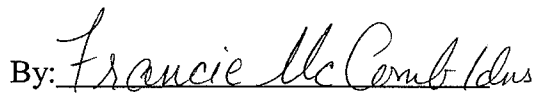
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May 27, 2008

CERTIFICATE OF SERVICE

I, Tara Mahoney, hereby certify that on this 27th day of May, 2008, copies of the foregoing Reply to Verizon's Opposition to Motion to Dismiss or, in the Alternative, Deny Petition for Forbearance was served upon each of the following by the methods indicated below.

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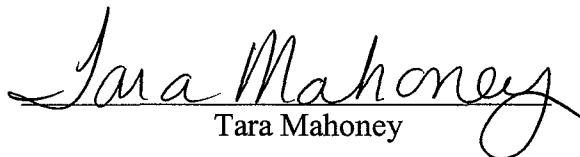
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